FILED
APR 15 19
WM. R. STAN

No 268

Supreme Court of the United States

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Petitioner,

vs.

EDITH F. COOGAN, AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF WILLIAM COOGAN, DECEASED, *Respondent.*

REPLY BRIEF AND ARGUMENT ON BEHALF OF PETITIONER.

F. W. ROOT,
C. O. NEWCOMB,
A. C. ERDALL,
25 Milwaukee Station,
Minneapolis, Minnesota,
Attorneys for Petitioner.

Of Counsel:
O. W. DYNES, ESQ.,
Chicago, Illinois.

Hayward Brief Company, 601-607 Fourth Ave. So., Minneapolis

INDEX

	Page.
Reply brief and argument on behalf of petitioner	1
Authorities	13
Assumption of risk	19
Minnesota decisions	20

TABLE OF CASES

Page.

Bruckman v. C., St. P., M. & O. Ry. Co., 110 Minn. 309 .. 22

Chesepeake & Ohio Railway v. Ware, 95 S. E. 183 15

Chicago, Rock Island & P. Ry. Co. v. Brown, 229 U. S. 317, 33 Sup. Ct. Rep. 840 19

Gilo Valley Ry. Co. v. Hall, 232 U. S. 94, 34 Sup. Ct. Rep. 229 19

Hinshaw v. State, 147 Ind. 334 15

Myers v. Pittsburgh Coal Co., 233 U. S. 184, 34 Sup. Ct. Rep. 559 13

McIntosh v. G. N. Ry. Co., 151 Minn. 527 21

Pittsburgh Coal Co. v. Myers, 203 Fed. 221 14

Philadelphia & Reading Ry. Co. v. Effinger (C. C. A.), 299 F. 950 16

Patton v. Texas & Pacific Railway Co., 179 U. S. 658, 21 Sup. Ct. Rep. 275 17

Perkins v. G. N. Ry. Co., 152 Minn. 226 22

Reading Co. v. Boyer (Circuit Court of Appeals, Third Circuit), 6F (2d) 185 16

Texas and Pacific Railway Co. v. Harvey, 228 U. S. 319, 33 Sup. Ct. Rep. 518 20

Texas & Pacific Railway Co. v. Swearingen, 196 U. S. 57, 25 Sup. Ct. Rep. 164 20

Truax v. M., St. P. & S. S. M. Ry. Co., 89 Minn. 143 22

Union Pacific Company v. Huxoll, 245 U. S. 535, 38 Sup. Ct. Rep. 187 13

United States v. Ross, 92 U. S. 707, 23 Sup. Ct. Rep. 281 . 15

Supreme Court of the United States

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY,
Petitioner,

vs.

EDITH F. COOGAN, AS SPECIAL ADMINISTRATRIX OF THE ESTATE OF WILLIAM COOGAN, DECEASED, *Respondent.*

REPLY BRIEF AND ARGUMENT ON BEHALF OF PETITIONER.

Statements are made in respondent's brief which are inaccurate and misleading and for that reason it is thought advisable to file this brief and argument in reply to respondent.

It is important to keep in mind that only one act of negligence was pleaded or is claimed by the respondent, to wit: That the air pipe located on top of the ties and south of the rails of track No. 1, was defective and that such defective condition was the proximate cause of decedent's death. Respondent does not and could not claim that the train itself was improperly handled.

Her claim is that it was the duty of decedent to couple up the air hoses on the train in question. That certain air hoses had been coupled up and, therefrom infers that decedent was attempting to couple up the air hoses between the caboose and the car attached to it when he was killed.

Relying on testimony of Odekirk she claims men, in coupling air hoses, face the engine and under the circumstances would have their left foot outside the rails. She also claims that decedent's left shoe was under the air pipe line and became fastened under same at the alleged defective place when the train was shoved to clear the lead track. In support of this she relies on the slight indentation appearing on the outside counter of the heel of decedent's left shoe, noticed sometime after the funeral.

The important ultimate facts to be determined are: Was decedent's left foot caught under the air pipe line at the time of the accident and did this proximately contribute to his fatal injuries.

Respondent must, of course, show petitioner violated a duty which it owed to decedent. Respondent's claim is that decedent at the time of the accident was coupling air between the caboose and car attached to it and that it was his duty to do so. That the petitioner owed the duty to furnish decedent a safe place to work and the claimed defective air pipe line made it unsafe.

In the last paragraph of page 3 of respondent's brief it is stated that Dubke coupled up the air four cars from the engine and then found that air was escaping from the end of the train. This is misleading as Dubke testified he made other couplings before the body was discovered (R. 24). This undisputed testimony conclusively shows that Coogan did not couple the air hoses on all of the cars as claimed by respondent.

On page 4 respondent states:

> "The kicked up condition of the ground and the blood found just opposite the south rail of track 1, indicated Coogan's body had been dragged a distance of 15 feet."

Respondent's witness, Coroner Engelbert, testified the body appeared to have been dragged for ten feet, that is, the ground was scuffed up to a point about ten feet west of the body (R. 10 and 11). Her witness, Jeffers, testified the ground looked as though Coogan had been dragged eight or ten feet (R. 18), while her witness, Odekirk, said the body had been dragged, he would judge, a distance of ten or twelve feet, maybe fifteen. The testimony of respondent's own witnesses indicates the body was dragged about ten feet.

On page 5 respondent states that fifteen feet west of the body the air pipe line was in a defective condition. In support of her statement respondent refers to pages 39, 40 and 41 of the record. The only testimony on this feature, on the pages mentioned, is that of the witness, Odekirk, alias Murphy, who testified:

> "How far from the body was it that, or how far from the body was it to where you noticed the condition of the pipe that I have called your attention to?
>
> A. About a car length and a half. Perhaps I don't understand your question.
>
> Q. How far from the body was it to the particular place where you noticed the condition of this air pipe?
>
> A. It was a half a car length, I should judge."

Odekirk also testified that the average box car is forty feet long (R. 45) or in other words, he testified the bend in the pipe was from 20 to 60 feet west of the body.

Several pictures were taken showing the location of the body and the nearby cars. Several of them showed the entire second car ahead of the caboose and about half of the third car ahead of the caboose, or in other words, showed the cars and air pipe line for a distance of about 30 feet west of the body. Mr. Lieb, who took the pictures men-

tioned, testified the bend or bulge in the pipe was west of the area shown in the pictures (R. 64). He also testified the bend or bulge in the pipe was 40 or 50 feet west of the body.

Exhibit "G" referred to on page 5 of respondent's brief was taken from under the third car ahead of the caboose for the purpose of and did show the ties and ballast in the opening between the second and third car where the hat was found (R. 72).

There was no evidence indicating that Coogan, on the morning of the accident, was in the immediate vicinity of the bend in the air pipe line. Respondent's statement that the bulge or bend in the pipe was 15 feet west of the body, is incorrect.

On page 5 of her brief respondent states the counter of the left shoe had a round depression running parallel with the sole of the shoe. This is misleading as the depression was nearly round in shape. On page 5 respondent states:

> "The shoes were in the same condition at the time they were taken from the body as when offered in evidence."

This statement is merely a presumption not based upon the evidence. Messrs. Goodwin and Gephart, witnesses for respondent, were the sole witnesses on the condition of the left shoe. The evidence actually shows that Goodwin, one of the attorneys for respondent, visited the undertaker about ten days after the accident and saw the shoes (R. 53); that Undertaker Gephart, after removing the shoes from the body, put them in his garage. That quite a while after the body was shipped to Austin, Messrs. Sheehan and Goodwin, the respondent's attorneys, called on Gephart and he gave the shoes to them (R. 27). The shoes were kept because

bums ask for them and not because of any peculiar condition of the shoes (R. 28). Gephart paid no particular attention to the shoes when in the garage (R. 29). He kept a car, a delivery truck, packing for furniture and sometimes boxes, in the garage (R. 29). This witness testified on direct examination as follows:

> "Q. At the time you gave those shoes to me was your attention called to anything in connection with the shoes? * * *
>
> A. Yes, you said there was a mark on the counter of one shoe, and you said, 'Look at that.'
>
> Q. Did I show it to you?
>
> A. Yes.
>
> Q. I called your attention to the left shoe, the outside of the counter above the heel?
>
> A. I don't remember which shoe it was" (R. 29).

He further testified:

> "Q. That is the first time you had any recollection of seeing this mark on the counter of the shoe was when Mr. Sheehan called your attention to it?
>
> A. Yes" (R. 29).
>
> "Q. Have you any personal recollection of the condition of those shoes at the time they were taken off Mr. Coogan's body?
>
> A. No" (R. 29 and 30).

In the first paragraph on page 1 of respondent's brief it is stated:

> "It appears that it was the duty of Coogan to couple the air on this freight train."

Plaintiff bases this solely upon the following quoted testi-

mony of her witness, Oldekirk, who was a member of the switching crew:

"Q. Was it any part of the duties of your crew, yourself and Dulke or any of your crew, to couple that air?

A. No.

Q. Whose duty was it?

A. The duty of that crew of 92.

Q. Who, of the crew of 92?

A. Mr. Coogan and Bellamy and Jeffers."

Respondent's witness Dulke, the only other witness to testify on this feature of the case makes it definite as to which member of this crew owed the duty to couple the air and states that it was the duty of Mr. Bellamy, the head brakeman of crew 92. Mr. Dulke testified:

"Q. Was it your duty to couple up the air?

A. No.

Q. Whose was it?

A. The head brakeman of the road crew.

Q. Who was the head brakeman?

A. Mr. Bellamy.

Q. How did it happen that you coupled up the air?

A. I did it for him for a favor. I did not have to do it" (R. 24).

The testimony of respondent's own witnesses, therefore, shows that it was the duty of Mr. Bellamy, head brakeman, and not the duty of Mr. Coogan to couple up the air in question. Therefore, petitioner, at the time in question, owed no duty to furnish Coogan a safe place to couple up air hoses.

The following erroneous statement is also made in the paragraph of respondent's brief just referred to:

"With the exception of the coupling between the car house and the next car thereto the couplings had all been made prior to the accident except the coupling between the last four cars put in and the two cars above referred to."

In support of this statement respondent refers to the testimony of H. W. Engelhart, the conductor of Dahlonega Journey, who arrived at the scene of accident at nine o'clock (R. 24) or about two hours after the accident.

Respondent's witness Dahlke testified that he coupled up the air on various cars. His testimony is as follows:

"Q. What is your best estimate as to the number of cars you did couple up the air on?

A. Two or three of them" (R. 28).

Dahlke did not know whether or not air was coupled in the various cars of cars kicked in on track No. 1 (R. 25). In other words, Wingate may or may not have coupled up the air on cars in the train. There is no proof that he did. There is no proof that either Jeffries or Dahlonega did not couple the air or that one of the investigators after the accident didn't couple up the air on some of those cars. There isn't a scintilla of evidence that Wingate coupled up the air on any car in the train. Respondent, by her witness, Dahlke, agreed that it was the duty of the road crew to couple up the air hoses and then followed this by testimony of her witness, Dahlke, and proved that of the road crew it was the duty of Head Brakeman Dahlonega to perform this work. It is interesting to note that Dahlke testified after Dahlke and explained the testimony of Dahlke in this regard. It is also interesting to note that Dahlonega was never called as a witness and neither side asked him if it was his duty to couple the air hoses. It appears, therefore,

that both sides were satisfied that it was Delhanty's duty. There is no evidence that Coogan coupled up the air on any car and respondent's own witnesses show that Delhanty and not Coogan owed the duty to couple up the air on the train in question. Respondent's proof also shows that the air was also coupled up at more than one place in the train by her witness, Dubke. On page 9 of her brief respondent states in substance, that petitioner did not, in the State Court, dispute that it was Coogan's duty to couple the air. This matter was not referred to specifically in petitioner's brief in chief in the State Supreme Court and no reply brief was introduced in the State Supreme Court. Counsel apparently has either overlooked or forgotten that petitioner argued this matter orally before the State Supreme Court. The proof shows it was not Coogan's duty and no concession has been made in this respect.

On page 9 respondent in summary states:

> "It being his duty to make this coupling and the fact that he had made all the other couplings of the air with the exception hereinbefore referred to, and it being shown that he was at this point, it is a fair inference that he was engaged in the performance of his duty."

As previously stated it was Delhanty's and not Coogan's duty to couple up the air. There is no proof that Coogan coupled up any air on the train. Therefore, the inference that he was engaged in the performance of a duty owed the defendant at the time of the accident is not based upon any fact proven in this case.

The inference that Coogan had coupled up the air hose on other cars of the train and that he was coupling up the air between the caboose and car attached to it is very im-

probable. The air hoses just mentioned were not coupled after the accident. When the first cut of cars was coupled onto the caboose Coogan was standing next to the caboose (p. 25). If it was his duty to couple the air hoses between the caboose and car attached to it he would, of course, be apt to couple up the air at once after the first cut of cars coupled onto the caboose because he would know that the cars would not be moved until Dubke returned with another cut of cars. The inference in which respondent indulges, to the effect that Coogan at the time of the accident was in the act of coupling the air between the caboose and the car attached to the caboose, seems inconsistent with the facts proved in this case.

On pages 9 and 10 of her brief, respondent states the position which she claims Coogan was in at the time of the accident. The claim is that the natural position for Coogan to take would be to place his right foot inside the rail and left foot outside the rails and inside of the air pipe line, facing the engine. There is no proof as to the position Coogan ordinarily took in doing work of this character. Respondent claims testimony of her witness Odekirk, as to the natural position in doing this work, is sufficient basis for the jury finding that Coogan coupled up air in the manner they claim, that is, with right foot inside and left foot outside of the rails.

Petitioner's witness Binko, a yard master and trainman of twenty years, testified he had never seen a man couple up cars with his right foot inside the rails and his left foot outside the rails and pointed out it would be dangerous to do the work in that way (R. 90, 91 and 92). The testimony of Trainmaster Lieb (R. 61), General Car Foreman Palmer (R. 70 and 90), and General Freight Car Foreman Hem-

sey (R. 89) coincides with that of Binko. It is stated, however, that some small men have both feet inside the rails (R. 88 and 89). Coogan's shoes were small and possibly he was small enough so that he could couple air hoses with both feet inside the rails. It is clear from the proof, therefore, that the best that can be said for plaintiff's contention is that there are several different methods of going in between cars to couple up the air and there is no proof as to what method Coogan ordinarily used in doing this work. The burden, of course, is upon the respondent to show Coogan was doing the work claimed and that he was doing it in the manner contended for. There is no proof to support either contention.

On page 10 the statement is made that petitioner's witnesses Lieb, Palmer and Hemsey had no experience in coupling air hoses. Of course, the statement is erroneous. The train master has supervision over the trainmen and, of course, in order to supervise and instruct the trainmen must know how to do the work. Train Master Lieb testified the last switching he did was for a period of two months, two years before the trial (R. 70 and 71). General Car Foreman Palmer testified he had experience in coupling and uncoupling cars, and of course, this includes air hoses, practically all of his life (R. 84). General Freight Car Foreman Hemsey testified he had had considerable experience in coupling and uncoupling cars and had observed switchmen, trainmen and carmen doing such work (R. 88).

Respondent had the burden of proving Coogan was coupling air hoses on the cars. She called Conductor Jeffers and Switchman Dubke as her witnesses but didn't ask them any question as to how to couple or uncouple air hoses. A statement that a train master and general car foreman are

not familiar with the manner of coupling air hoses on trains seems ridiculous. Petitioner's witness Binko also testified as to the manner of coupling air hoses and disagreed with Odekirk. Binko testified he had considerable experience in coupling and uncoupling air hoses as a yard foreman and trainman. He had worked for petitioner for ten years steadily and off and on for 20 years as brakeman, switchman and yard foreman (R. 89 and 90).

It seems inconceivable that a foot could become caught between a round iron pipe one and three-fourths inch outside diameter (R. 78 and 85), and flat ties and ballast. The bulge in the pipe was 12 or 15 feet long (R. 69) and could be bent by putting your foot against it (R. 68). At the maximum bulge the pipe was six inches or more south of the south rail of track No. 1 (R. 41 and 68) and was bent up three and one-half or four inches above the ties (R. 41). This is not like a crossing frog with sharp edges and flat surfaces where a foot may become wedged in and caught. The ultimate presumption indulged in by the respondent not only is not based on any fact in the case but is also an improbable one.

On page 19 of her brief, respondent refers to "defendant's admitted negligence." Defendant has made no such admission.

Respondent indulges in a large series of presumptions not supported by the facts in the case. Respondent presumes:

1. That it was Coogan's duty to couple the air hoses in the train.

2. That all the air hoses on the train were coupled immediately after the accident.

3. That Coogan coupled the air hoses on the entire train except the air hose coupling four cars from the engine.

The first three presumptions are disputed by respondent's witness Dubke.

4. That at the time of the accident Coogan was about to couple the air between the caboose and the car attached to it.

5. That he was standing in a stooping position and his foot slipped back.

6. That at the time he was at the point where the iron air pipe was bent or bulged.

7. That at the time of the accident he was standing with his right foot inside and left foot outside the rails.

8. That his left shoe did not have a dent on the counter before the accident.

9. That the dent in the counter of the left shoe, first noticed some time after the funeral, was caused in the accident.

10. That the shoe did not become scratched or dented while on the floor of the undertaker's garage.

11. That the shoe was indented in the accident but not on account of hitting some part of the car, rail, pebble, tie or air pipe line.

12. That the dent in the shoe was caused by the shoe and foot being caught under the round air pipe line.

13. That while his foot was fastened under the round air pipe his clothing was caught in the rigging of the car and he was thrown under the train and run over.

Authorities.

In her brief, respondent quotes from the case of *Union Pacific Company v. Huxoll*, 245 U. S. 535, 38 Sup. Ct. Rep. 187. In the Huxoll case it was claimed that the power brake on the locomotive was defective. The engineer was notified instantly that the engine had struck a man and he immediately applied the brake. The proof showed that if the power brake was in good order the engine could have been stopped in eight or ten feet and the proof showed it actually moved 135 feet. Huxoll's arm was run over by the middle driving wheel. This is, of course, considerably more than ten feet from either end of the engine. In that case, therefore, there were facts in evidence from which the inference could reasonably be drawn that the defective power brake was the proximate cause of Huxoll's fatal injuries.

In the present case it has not been shown that the bend in the air pipe line or that the air pipe line had anything to do with the accident or that the accident occurred at the point where the air pipe line was bent. On the contrary, the evidence shows the accident occurred from 15 to 35 feet east of the bend in the air pipe.

In the Huxoll case the defective power brake was applied to stop the engine and the only inference which it was necessary for the jury to decide in the Huxoll case was what effect the defect in the power brake had in the stopping of the engine and whether or not Huxoll would have been killed if the power brake had been in good condition. In the instant case there is no causal connection between the air pipe line and the accident.

Respondent cites *Myers v. Pittsburgh Coal Company*, 233 U. S. 184, 34 Sup. Ct. Rep. 559, which reverses an opinion

of the Circuit Court of Appeals of the Third Circuit, to-wit: *Pittsburgh Coal Co. v. Myers*, 203 Federal 221. Petitioners were not aware that this case had been decided by the United States Supreme Court when cited in their brief. We considered this case as a rather extreme one and were inclined to be skeptical of the soundness of the decision. Nevertheless, in as much as it was a decision of the Circuit Court of Appeals we felt that it should be given some weight until overruled by the United States Supreme Court. It will be noted that the case was cited without comment. The United States Supreme Court brought out certain facts not disclosed in the opinion of the Circuit Court of Appeals. In the Myers case the decedent was a brakeman on an electric train used underground in a coal mine. The electric motor kicked several cars to make a movement known as a flying switch. Decedent at this time and when last seen alive was standing on the bumper of the last car. The flying switch was made and the cars proceeded down on the track on which they were to move. Shortly thereafter the electric motor in following these cars ran over Myers. In the immediate vicinity of the accident an electric wire crossed the track only five feet and eight inches above the rails and it was shown that at this height a man standing on the car would be struck by the wire. Myers' hat with a lighted lantern upright lay beside him at the time he was run over. The headlight on the electric engine was defective so that Myers was not noticed on the track and it was shown that if the light had been in proper condition Myers could have been seen and the engine stopped.

The Circuit Court of Appeals' decision did not bring out the fact that Myers was alive when run over. The United States Supreme Court decision showed this fact and showed

that he was alive even after he was run over. The Supreme Court decision also brought out the fact that he was a young man of unusual strength and vigor immediately before the accident. On page 224 of the Circuit Court of Appeals' decision the Circuit Court indicated that it was of the opinion that Myers may have been killed by the current in the wire or by the fall from the car. The United States Supreme Court decision brings out the fact that this could not be true because he was alive after being run over by the electric motor. The evidence was such that the jury could properly find that Myers was not killed by coming in contact with the wire and could find that he was run over and killed on account of the defective headlight. The United States Supreme Court decision as indicated brought out the fact that he was an excellent physical specimen and it was also shown that the voltage in the wire was intermittent only and that it was doubtful whether or not the voltage would be of sufficient strength to materially injure the man in question. We think it clear, therefore, that the Myers case is not controlling.

On page 16 of her brief respondent quotes from the case of *Chesapeake & Ohio Railway v. Ware*, 95 S. E. 183, which in turn cites *Hinshaw v. State*, 147 Ind. 334. The rule stated in the case just mentioned seems to be in conflict with the rule laid down by this Court. The correct rule is stated in *United States v. Ross*, 92 U. S. 707, 23 Sup. Ct. Rep. 281 at 281, and is as follows:

> "A presumption which the jury is to make is not a circumstance in proof; it is not, therefore, a legitimate foundation for a presumption."

The inference must be drawn from a fact proved in the case. This is rather aptly expressed in *Reading Company v.*

Boyer (Circuit Court of Appeals, Third Circuit) 6 F. (2d) 185, at page 186. In this case Brakeman Boyer was last seen getting off the engine that ran over him. It was claimed that he stepped on the ground and lost his footing for the reason that at the place in question the track was unballasted and that he fell under the train in consequence thereof and was killed. The Court said:

> "As there were other ways in which Boyer might have met his death which did not involve negligence of the defendant, the case falls, we think, within the rule of *Murray v. Pittsburgh, etc., R. R. Co.*, 263 Pa. 398, 403, 107 A. 21, 23, followed by this court in *Philadelphia & Reading Ry. Co. v. Cannon*, 296 F. 302, wherein the Supreme Court of Pennsylvania said:
>
> > 'It is not enough for plaintiff to show his injury might have been due to more than one possible cause, for only one of which defendant is responsible. He is obliged to go further and show the cause that fastens liability upon defendant was the proximate one and the jury should not be permitted to base a verdict upon a mere conjecture that the injury was caused by one or the other.'

This is but another statement of the old rule that a party seeking to recover damages for injuries occasioned by negligence must establish negligence by affirmative testimony. *Of course, this does not mean that negligence must always be proved by the testimony of eye witnesses. Philadelphia & Reading Ry. Co. v. Effinger* (C. C. A.), 299 F. 950, *but it does mean that it must be established, if not by the testimony of eye witnesses, then by surrounding facts and circumstances which, though inanimate, speak the truth and affirmatively prove the*

fact. We cannot find in the record any testimony which tends to prove how Boyer met his death and, accordingly, we have not found any evidence to support the verdict of the jury that his death was occasioned by negligence of the defendant." (Italics my own.)

In the Boyer case the Court, on page 186, also said:

"There is no evidence which remotely indicates that the decedent 'lost his footing and was thrown under the train' because of lack of ballast."

In the instant case there is no evidence which remotely indicates that Coogan caught his left foot under the pipe where it was alleged to be defective and was caught by the rigging of the cars and thrown under the wheel.

On page 17 of her brief, respondent in endeavoring to distinguish *Patton v. Texas & Pacific Railway Company*, 179 U. S. 658, 21 Sup. Ct. Rep. 275, says:

"In the Patton case there was no evidence tending to point to any one particular cause for which the master would be responsible."

We think a like statement should properly be applied to this case. Coogan was the rear brakeman. Men in that position ordinarily ride in the caboose or in other words, the rear end of the train. He must have known that the train would leave in a very short time on its journey but he may not have known that the train was to be moved immediately. At the time of the accident it is very probable that he was in the act of getting on the caboose and had his right foot on the step and that his left foot was still in the air when the cars were moved so that the caboose moved away from him and he lost his balance and fell on the track between the caboose and the car attached to it and was run

over by the last mentioned car. Under these circumstances his left leg and arm would be apt to be inside the rail and the right side of his body outside the rail. If the accident happened in this manner there would, of course, be no liability.

He may have been approaching the caboose from the south and tripped over the end of the ties and fallen on the rail just as the train was moved and in endeavoring to scramble out was caught and run over. If the accident happened in this manner there, of course, would be no liability.

He may, as railroad employes sometimes do, have stepped in between the caboose and the car attached to it to answer a call of nature. He may have been entirely inside the rails preparing to couple the air hoses and have been knocked down by the train when the cars were shoved to the east. He may have been between the caboose and car attached to it for the purpose of coupling the air hoses, as claimed by respondent, but with his right foot outside the rail and his left foot inside the rail, facing the angle cock and while in such position have been hit by the cars moving backward and knocked on the rail so that the left arm and leg were inside the rail and the right side was outside the rail. Under any of the above presumptions there would, of course, be no liability and we feel that the above inferences are just as consistent with the evidence as respondent's theory. We feel, however, that there is insufficient evidence on which a jury could find that any one of the above presumptions or the presumption indulged in by the respondent was the actual manner in which Mr. Coogan lost his life.

Assumption of Risk.

Certain cases were cited by respondent on the question of assumption of risk. In *Gila Valley Ry. Co. v. Hall*, 232 U. S. 94, 34 Sup. Ct. Rep. 229, it was held that an employe injured by the derailment of a three-wheeled gasoline car on which there was a defective flange, was not presumed to know of the defect where he had been employed in work that required him to ride on such gasoline car for a period of a few days only prior to the accident. This case does not appear to be in point. Coogan had worked on trains 91 and 92 for three or four months and had had considerable experience on trains running in and out of the Farmington Yard prior to that period of time (R. 56, 62, 63, 64 and 75). It would seem that Coogan should be presumed to know of the conditions existing on and around the track on account of his extensive experience working in and around that track.

Chicago, Rock Island & P. Ry. Co. v. Brown, 229 U. S. 317, 33 Sup. Ct. Rep. 840, is a case where a brakeman after repeated unsuccessful attempts to uncouple moving cars by the uncoupling lever, found it necessary to reach in between the cars to lift the pin. The cause of action, therefore, was governed by the Federal Safety Appliance Act. Under that act contributory negligence and assumption of risk are not available as defenses.

In the present case the rights and liabilities of the parties are governed by the Federal Employer's Liability Act. Under this act contributory negligence is a comparative defense while assumption of risk is an absolute defense. The Brown case, therefore, is not in point as the statutes involved are radically different. The Brown case is so dissimilar from the present case as to be of no assistance to

the Court on any phase of the matter before them.

The quotation from the Brown case on page 20 of respondent's brief, if read in connection with the balance of the decision, shows that the United States Supreme Court agreed with the conclusion reached by the trial court and the Circuit Court of Appeals and therefore affirmed the lower court.

Texas & Pacific Railway Co. v. Harvey, 228 U. S. 319, 33 Sup. Ct. Rep. 518, involved the interpretation of the statute of the state of Texas relating to assumption of risk and that portion of the decision should, of course, be disregarded.

In *Texas & Pacific Railway Company v. Swearingen*, 196 U. S. 57, 25 Sup. Ct. Rep. 164, it appears that a switchman riding on the side of a string of box cars was swept off the car by coming in contact with a scale box located only two feet from the rail. The accident happened at night and he was looking to the rear for signals. He had not observed the scale box carefully, prior to the accident, had taken no measurements and had merely observed it from a distance and was unaware of its nearness to the track. This decision would also appear to be of little benefit in the instant case.

The decisions cited by petitioner in its brief in chief on assumption of risk would seem to be controlling.

Minnesota Decisions.

On page 13 and on page 15 of her brief respondent has referred to certain decisions of the Minnesota Supreme Court. None of these decisions involve facts similar to those of the instant case. The decisions speak for themselves and a discussion of them in this brief would not seem to be particularly helpful. Most of these decisions were discussed in petitioner's brief on the appeal to the State Supreme Court

and features distinguishing them from the Coogan case were pointed out.

The Minnesota Supreme Court apparently placed considerable reliance on the case of *McIntosh v. G. N. Ry. Co.*, 151 Minn. 527. In that decision the Chief Justice and one of the four Associate Justices, on reargument, dissented to the opinion of the majority. We feel that that decision is at variance with the rule adopted by this Court.

It is clear that the Minnesota Supreme Court was very skeptical of the soundness of their position in the instant case. The decision is reported on pages 104 and 105 of the record and contains the following:

> "On the left side of the *defendant's* left shoe just above the heel was an indentation such as *might* have been made if it had been caught beneath the air line."

In other words the indentation didn't point to the fact that the shoe was caught, but they merely held that if the shoe was caught such an indentation might have been made. The important thing is, was the shoe caught. The Court also said:

> "The position of the body of a man who has met his death in a violent accident, or physical marks thereon, usually do not furnish persuasive proof of the manner of the occurrence."

In other words, the State Supreme Court recognized the fact that the nature of Coogan's injury to his left leg and left arm were inconsistent with a theory that his left foot was outside of the rails.

If physical marks on a body do not furnish persuasive proof of the manner of the occurrence it would seem the same reasoning would apply to physical marks on a shoe

on the foot of the same body. In other words, the dent in the counter of the shoe doesn't show that it was caught under the air pipe line.

The Court also stated:

> "*Though the case is a close one* we reach the conclusion that the finding of a causal connection between the bent air line and the death of the decedent has substantial evidence in its support." (Italics my own.)

In some of their decisions the Minnesota Supreme Court has adhered more closely to the rule that verdicts must not be based on speculation and conjecture.

See *Perkins v. G. N. Ry. Co.*, 152 Minn. 226.

Bruckman v. C., St. P., M. & O. Ry. Co., 110 Minn. 309.

This last decision, in the index to petitioner's brief in chief, was erroneously cited as 220 Federal 553.

The case of *Truax v. Mpls., St. P. & S. S. M. Ry. Co.*, 89 Minn. 143, is a well reasoned decision. In that case a mail agent while throwing a mail bag from a depot platform to a passing mail car, lost his balance and fell between the platform and train and was seriously injured. Two weeks after the accident he investigated the premises and decided that he was at a particular point on the platform because the platform gave under his weight in the same manner that it did at the time of the accident. On page 146 of the decision, the Minnesota Supreme Court stated as follows:

> "At the trial he said he did not slip or stumble on anything and did not know what it was that caused him to lose his balance until about two weeks after the accident when upon examining the platform he discovered the loose planks and that when stepped upon at the outer edge they would give under his weight. His only

method of connecting this condition of the platform with the accident was the fact that he found by stepping upon the planks he experienced a similar sensation to that which he felt after throwing the bag into the car."

On page 147, the Court further said:

"*In the absence of positive proof that the planks were actually stepped upon and at a point where they gave way under the weight imposed upon them, the whole matter is left in the realm of pure conjecture. Verdicts based upon evidence of this character cannot be permitted to stand. There must be a definite and reasonable connection between the cause and effect. Juries are not permitted to speculate in arriving at a conclusion, however unfortunate the result may be for the injured person.*" (Italics my own.)

The above case, we feel, is controlling for the reason that in that case the plaintiff was unable to connect the defective condition up with the accident. In the instant case there is absolutely no competent evidence either direct or circumstantial to show or indicate that William Coogan's foot was caught or fastened under the alleged defective air pipe line. There is absolutely no proof to show that either of his feet were ever under the air pipe line at the point where it was bent or at any other point. There is no proof that he was on the day in question, ever in the immediate vicinity of the air pipe line where it was claimed to be defective. There is absolutely no proof whatever that the air pipe line caused or contributed or had anything whatever to do with Coogan's death.

We respectfully suggest that the decisions of this Court

cited by the petitioner in its brief in chief are controlling in the instant case.

Respectfully submitted,

F. W. Root,
C. O. Newcomb,
A. C. Erdall,
25 Milwaukee Station,
Minneapolis, Minnesota,
Attorneys for Petitioner.

Of Counsel:
O. W. Dynes, Esq.,
Chicago, Illinois.

Service of the foregoing reply brief and argument on behalf of petitioner is hereby admitted this 12th day of April, 1926.

S. A. Anderson,
Attorney for Respondent.